



# Registration test decision

Application name	Bigambul People
Name of applicant	Russell Doctor, Elaine Georgetown, Rhonda Sandow, Cyril Logan
NNTT file no.	QC2009/002
Federal Court of Australia file no.	QUD101/2009
Date application made	14 April 2009
Date application last amended	19 June 2015 (leave granted on 1 May 2015)

I have considered this claim for registration against each of the conditions contained in ss 190B and 190C of the *Native Title Act 1993* (Cth).

For the reasons attached, I am satisfied that each of the conditions contained in ss 190B and 190C are met. I accept this claim for registration pursuant to s 190A of the *Native Title Act 1993* (Cth).

Date of decision: 30 October 2015

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Lisa Jowett

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 4 May 2015 and made pursuant to s 99 of the Act.

# Reasons for decision

## *Introduction*

[1] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Bigambul People claimant application (QUD101/2009) to the Native Title Registrar (the Registrar) on 19 June 2015 pursuant to s 64(4) of the Act<sup>1</sup>. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A: see subsection 190A(1).

[2] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Subsection 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in a registered amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B and 190C.

[3] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to the claim made in this amended application. The granting of leave by the Court to amend the application was not made pursuant to s 87A, and thus the circumstance described in s 190A(1A) does not arise. The amendments to the application include a change to the description of the native title claim group which is not of a type contemplated in s 190A(6A) and does not therefore meet the requirements of that condition.

[4] I have therefore considered the claim made in the application against all of the conditions in ss 190B and 190C. I am satisfied that the claim must be accepted for registration pursuant to ss 190A(6), and this document sets out my reasons, as the delegate of the Registrar, for my decision.

## **Application overview and background**

[5] The Bigambul People claimant application was first made on 14 April 2009. It has previously been amended on 8 May 2014 and accepted for registration on 31 October 2014.

[6] On 1 May 2015 the Court ordered the replacement of the applicant and granted the new applicant leave to further amend the application. The most significant amendments are those made to the description of the native title claim group (at Schedule A), to the description and map

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<sup>1</sup> All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

of the external boundary of the area covered by the 2014 amended application (at Schedules B and C) and to the information pertaining to the authorisation of the applicant to make and deal with the application (at Schedule R).

[7] The area covered by the application falls in south-central Queensland, in riverine country of the lower Darling Downs.

### **Information considered when making the decision**

[8] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar 'may have regard to such other information as he or she considers appropriate'. Attachment B of these reasons lists all of the information and documents that I have considered in reaching my decision.

#### *Subsection 190A(3)(a): Application and other documents provided by the applicant*

[9] As required by s 190A(3)(a), I have had regard to information in the amended application.

[10] The applicant sought the leave of the Court to amend the application on 24 April 2015. Annexed to its legal representative's affidavit, the applicant included a large volume of material forming Attachments F, G and M to the proposed amended application. On 12 June 2015 the Court ordered that the further amended application not include these attachments. On 29 July 2015, the applicant agreed that this material should be provided to the Registrar for the purposes of consideration under s 190A and did not seek any confidentiality requirement as the material was already on the public record in Court. These attachments are comprised of the following documents:

- Dr Anne Kenny, Consultant Anthropologist, Anthropology Report, 16 January 2015 (prepared for the Queensland South Native Title Services Limited) (Kenny 2015 Report);
- Daniel Leo, Anthropological Assessment of the Expert and Lay Evidence filed for the Bigambul Native Title Claim (QUD101/2009), February 2015 (commissioned by the State of Queensland for the purpose of litigation) (Leo Report);
- Statement of Agreed Facts, signed by the legal representative for the applicant on 26 March 2015;
- Report of Conference of experts held on 2 and 3 March 2015
- Affidavits of members of the native title claim group:
  1. [Claimant 1 – name deleted], dated 21 November 2014
  2. [Claimant 2 – name deleted], dated 24 September 2014
  3. [Claimant 3 – name deleted], dated 2 September 2014
  4. Cyril Daniel Logan, dated 1 August 2014

#### *Subsection 190A(3)(b): Searches conducted by the Registrar of State/Commonwealth interest registers*

[11] I note that there is no information before me of the kind identified in s 190A(3)(b).

*Subsection 190A(3)(c): Information supplied by Commonwealth/State*

[12] The State of Queensland (the state government) has not provided any submissions in relation to the application of the registration test.

*Section 190A(3): other information to which Registrar considers it appropriate to have regard*

[13] I have also considered information contained in an overlap analysis and geospatial assessment by the Tribunal's Geospatial Services dated 24 June 2015 (the geospatial report).

### **Procedural fairness steps**

[14] As noted above, I have considered the material in Attachments F, G and M attached to the proposed amended application and provided to the Registrar by the applicant. On 2 September 2015, I wrote to the state government advising that I would be relying on this information in my application of the registration test and that should they wish to make any submissions, they should do so by 16 September 2015. No comments or submissions were made in relation to the additional material. This concluded the procedural fairness processes.

# *Merit conditions: s 190B*

## **Subsection 190B(2)**

### **Identification of area subject to native title**

The Registrar must be satisfied that the information and map contained in the application as required by ss 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters

#### *Description of the area covered by the application*

[15] Schedule S of the application identifies that amendments have been made to the boundary description (Schedule B) and map (Schedule C) of the area covered by the application. Schedule B lists general exclusions for those areas not covered by the application and refers to Attachment B for the description of the external boundary. It is entitled 'Technical Description – QUD101/2009 Bigambul People (QC2009/02)' and describes the application area by metes and bounds, referencing geographic coordinate points, the New South Wales-Queensland border and topographic features. A note is included referencing the source, currency and datum of information used to prepare the description. The description was prepared by Geospatial Services and is dated 15 May 2015.

[16] Schedule C refers to a map attached at Attachment C which is a colour copy of an A3 map entitled "QUD101/2009 Bigumbal People (QC2009/002)" and dated 15 May 2015. This was also prepared by Geospatial Services, and includes the application area depicted as a dark blue line; topographic background showing towns, rivers and creeks; scalebar, northpoint, coordinate grid, locality map and legend; and notes relating to the source, currency and datum of data used to prepare the map.

#### *Consideration*

[17] The information in relation to the external boundaries of the area covered by the application allows me to identify the location and extent of those boundaries and to be reasonably certain of the area on the earth's surface. For the purposes of meeting the requirements of this section the general exclusion statements at Schedule B are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories described, and thereby be excluded from the application.

[18] The geospatial report makes the assessment that the description and the map are consistent with each other such that the area covered by the application is readily identifiable. I agree with that assessment. I am therefore satisfied that the external boundary of the area covered by the application is identifiable and, along with the general exclusions that serve to identify the internal boundaries, that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[19] The application satisfies the condition of s 190B(2).

### **Subsection 190B(3)**

#### **Identification of the native title claim group**

The Registrar must be satisfied that:

- (a) the persons in the native title claim group are named in the application, or
- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[20] Schedule A of the application does not name the persons in the native title claim group but contains a description of that group, being the basis for its composition. It is therefore necessary to consider whether the application satisfies the requirements of s 190B(3)(b). I note the comments of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 (*Doepel*) that the focus of s 190B(3)(b) is:

- whether the application enables the reliable identification of persons in the native title claim group—at [51]; and is
- not on ‘the correctness of the description . . . but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained’—at [37].

[21] Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*) was of the view that ‘it may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently’—at [67].

[22] The description of the native title claim group at Schedule A is as follows:

The native title claim group (“hereafter the claim group”) on whose behalf the claim is made is the Bigambul People. The Bigambul People are recognised as the descendants of Nellie Yumbeina, Queen Susan of Welltown, Jack Noble, Sally Murray, Susan mother of Duncan Daniels and Jack and James Armstrong.

[23] In my view, the description of the group is capable of being readily understood and is sufficiently clear such that it can be ascertained whether any particular person is in that group. I understand that a person will be a member of the native title claim group based on descent through the identified ancestral lines. It may be that some factual inquiry is required to ascertain how members of the claim group are descended from the named apical ancestors, but that would not mean that the group had not been sufficiently described.

[24] The application satisfies the condition of s 190B(3).

### **Subsection 190B(4)**

#### **Native title rights and interests identifiable**

The Registrar must be satisfied that the description contained in the application as required by s 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

[25] Schedule E of the application contains the description of native title rights and interests claimed in relation to the area covered by the application, as required by s 62(2)(d):

- 1 In areas where exclusive rights can be recognised:
  - (i) Other than in relation to Water, the rights to possession, occupation, use and enjoyment of the area to the exclusion of all others; and
  - (ii) In relation to Water, the non-exclusive rights to:
    - a. hunt, fish and gather from the Water of the area;
    - b. take and use the Natural Resources of the Water in the area;
    - c. take and use the Water of the area,for personal, domestic and non-commercial communal purposes.
2. In areas where exclusive rights cannot be recognised-non-exclusive rights to:
  - (i) access, be present on, move about on and travel over the area;
  - (ii) camp, and live temporarily on the area as part of camping, and for that purpose build temporary shelters;
  - (iii) hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial communal purposes;
  - (iv) take, use, share and exchange Natural Resources from the land and waters of the area for personal, domestic and non-commercial communal purposes;
  - (v) take and use the Water of the area for personal, domestic and non-commercial communal purposes;
  - (vi) conduct ceremonies on the area;
  - (vii) be buried and bury native title holders within the area;
  - (viii) teach on the area about the physical and spiritual attributes of the area;
  - (ix) maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from physical harm;
  - (x) light fires on the area for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation;
  - (xi) be accompanied onto the area by certain non-Bigambul people, being people required for the performance of ceremonies and cultural activities.
3. The native title rights and interest are subject to and exercisable in accordance with:
  - (a) The Laws of the State and the Commonwealth;
  - (b) The traditional laws acknowledged and the traditional customs observed by the native title holders
4. For the purposes of 1, 2 and 3 above:
  - (a) "land" and "waters", respectively, have the same meanings as in the Native Title Act 1993 (Cth)
  - (b) "Laws of the State and the Commonwealth" means the common law and the laws of the State of Queensland and the Commonwealth of Australia, and includes legislation, regulations, statutory instruments, local planning instruments and local laws;
  - (c) "Natural Resources" means:
    - (i) any animal, plant, fish and bird life found on or in the lands and waters of the claim area; and
    - (ii) any clays, soil or rock found on or below the surface of the claim area that have traditionally been taken and used by the native title holders, but does not include:
      - a. animals that are the private personal property of another;
      - b. crops that are the private personal property of another; and

c. minerals as defined in the *Mineral Resources Act 1989* (Qld) or petroleum as defined in the *Petroleum Act 1923* (Qld) and the *Petroleum and Gas (Production and Safety) Act 2004* (Qld);

(d) "Water" means:

- (i) water which flows, whether permanently or intermittently, within a river, creek or stream;
- (ii) any natural collection of water, whether permanent or intermittent; and
- (iii) water from an underground water source.

[26] Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified—*Doepel* at [92]. The description must therefore describe what is claimed in a clear and easily understood manner.

[27] In my view, the rights have been clearly and comprehensively described in a way that is meaningful and understandable, having regard to the definition of the expression 'native title rights and interests' in s 223.<sup>2</sup> The description is therefore sufficient to allow the native title rights and interests claimed to be readily identified.

[28] The application satisfies the condition of s 190B(4).

## Subsection 190B(5)

### Factual basis for claimed native title

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs

[29] For the application to meet this merit condition, I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs (a) to (c) of s 190B(5). In *Doepel*<sup>3</sup>, Mansfield J stated that:

Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the

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<sup>2</sup> This approach is supported by the decision of Mansfield J in *Doepel* at [91] to [92], [95], [98] to [101], [123].

<sup>3</sup> This was approved by the Full Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [82] to [85].

claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts—at [17].

[30] The decisions of Dowsett J in *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) also give specific content to each of the elements of the test at ss 190B(5)(a) to (c). The Full Court in *Gudjala FC*, did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala 2007*, including his assessment of what was required within the factual basis to support each of the assertions at s 190B(5). His approach in *Gudjala 2009* was consistent with the approach he took in *Gudjala 2007*.

[31] Arising from these decisions are clear principles which guide the Registrar when assessing the sufficiency of a claim’s factual basis. In summary, they are:

- the applicant is not required ‘to provide anything more than a general description of the factual basis’—*Gudjala FC* at [92];
- the nature of the material provided need not be of the type that would prove the asserted facts—*Gudjala FC* at [92]; and
- the Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted—*Doepel* at [47].

#### *The information in the application*

[32] The information which comprises Attachments F, G and M forms the factual basis for the assertion that native title rights and interests exist under the traditional laws and customs of the Bigambul People. The material consists of some 800 pages.

[33] The Leo Report<sup>4</sup> is an assessment of previous reports in relation to the Bigambul People’s native title claims and has been commissioned by the state government. It documents the key findings and conclusions of each previous report and provides its own conclusions and findings. The latest of these reports is the Kenny 2015 Report<sup>5</sup>. I have perused the report and understand it to be the product of earlier research conducted by the Dr Kenny over 2010/2011 (the subject of a final Kenny 2011 Report) and further fieldwork and literature research she conducted in 2014. The Leo Report describes the Kenny 2011 Report as a ‘culmination of a staged approach. Building on the work of the three preceding reports [Niblett 2003 and 2008, McFadden 2008], it is intended to meet all the evidentiary requirements for a determination of native title’—at (6.5), [619]. Dr Kenny was commissioned to ‘review as well as restructure and amend where [she] deemed necessary [her] Bigambul report that was lodged in 2011 and to indicate gaps and additional material that may be incorporated—at [12] to [17]. I have read the other documents<sup>6</sup> and also

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<sup>4</sup> Identified in Schedule F

<sup>5</sup> Identified in Schedule F

<sup>6</sup> Statement of Agreed Facts, signed by the legal representative for the applicant on 26 March 2015; and Report of Conference of experts held on 2 and 3 March 2015 (identified in Schedule F).

perused the extensive range of information in the 4 affidavits of members of the claim group, all of which form part of Attachments F, G and M.

[34] Given the volume of the material before me, I have decided to rely largely on the final conclusions and findings enunciated in the Leo Report for my assessment of the factual basis for the claim made in the amended application. The final conclusions and findings in the Leo Report are supportive of the findings in the Kenny 2015 Report and rely additionally on the 'lay evidence' of members of the claim group. In my view this is the most efficient use of the information before me for my task because the report synthesises the expert and lay evidence to date in relation to the Bigambul people and provides a concise overview and assessment of the material. Where I consider it to benefit my discussion, I have also quoted from or referred to some of the material in the affidavits and in the Kenny 2015 Report.

### **Reasons for s 190B(5)(a)**

[35] This subsection requires that I be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has, and its predecessors had, an association with the area of the application. It is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area all of the time. However, it is necessary that the material before the Registrar shows cumulatively an association between the whole group and the whole area of the claim—*Gudjala* (2007) at [51] and [52]. Further, Dowsett J also observed:

Similarly, there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty—at [52].

[36] The Bigambul People's claim covers an area of some 20,000 square kilometers, and 'is centered on the riverine area between the Macintyre and Weir Rivers'—Kenny 2015 Report at [3]. It includes the towns of Goondiwindi and Boggabilla located at its southern boundary, on the New South Wales border. The country around Tara and Inglewood proximate to the northern and eastern boundaries of claim area respectively have been and continue to be considered traditional territory by Bigambul people and their predecessors. The factual basis material refers to a number of pastoral stations in the claim area, many of which Bigambul people have been associated with through living or working on them since the early days of the pastoral industry—Talwood, Winton, Macintyre Downs and Welltown Stations.

[37] The expert historical evidence of the native title claim group's predecessors' association with the claim area is also summarized in the Leo Report<sup>7</sup>. For example:

- first contact having occurred in the claim area in 1827 and was followed by pastoral settlement in the late 1830s;

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<sup>7</sup> Walters 2015 Historical Report (covering the period from first contact to the first few years of 1900) referenced in the Leo Report—at [496] to [500]; [555]

- Aboriginal occupation throughout the claim area being demonstrated by a continuation of traditional resource utilisation, movement patterns and ceremonial life;
- despite continuing conflict and decline in the population between 1860 and 1880 there is a continuing presence of Aboriginal people on pastoral stations and a continuation of traditional activities including burial and ceremonial practices;
- between 1880 and 1900 there being a continuing presence on the pastoral stations, the emergence of fringe camps but a continuation of a traditional network of ceremonial life;
- accounts evidencing Aboriginal territoriality and practices, weapons and implements, use of resources, large gatherings for corroborees, Bora ceremonies and Bunya feasts, a regional network of exchange, mortuary rites of mourning and burial;
- genealogical information about the descendents of the apical ancestors is supportive of rights and interests relating to living on Bigambul country.

[38] The country is well known to claimants which is illustrated in the recounting of creation stories passed onto them by their predecessors – how people came to be on the country, how the animals and key geographic features of the landscape were made. The rivers, lagoons, waterholes, ceremonial and spiritual sites in the claim area are recognised as markers of Bigambul country, the knowledge of which has been passed onto them by their predecessors. All speak of evidence of the old people left on Bigambul country – grinding stones, knives and other stone tools, tree carvings, burial and bora grounds.

[39] The Leo Report is of the view that the totality of the expert and lay evidence provides ‘a strong basis to accept that Bigambul people as a whole have maintained a connection to the entirety of contemporary Bigambul country’ – at [525]. Mr Leo’s assessment of the lay evidence (including the 4 affidavits referred to earlier) is that Bigambul people ‘clearly demonstrate a significant amount of physical, cultural and spiritual connection to Bigambul territory from the 1920s through to the present’ – at [529].

[40] Members of the native title claim group speak of their parents and grandparents, uncles and aunts being born, growing up and living and working in the claim area. They know where some of their grandparents were born and are now buried – Bungunya reserve, Talwood, Tara, Goondiwindi. Their parents and grandparents camped on the Commoron Creek, Booberanna Creek at Welltown, the Moonie and Weir Rivers, their families lived at Boggabilla, Tara, Toobeah, Welltown, Turtle Bend. Members of the native title claim group have been told all their lives that Bigambul people have connections to the MacIntyre River, Inglewood and MacIntyre Brook, they speak of their ‘traditional country at Tara’.

[41] The claimant affidavits attest to Bigambul people camping on country with their families – teaching children and grandchildren about Bigambul land, law and custom. They are replete with stories of these trips – from the deponents’ childhoods to their adulthood – hunting, fishing, collecting bush tucker, visiting important places on Bigambul country, catching and preparing food ‘the traditional way’.

### *Consideration*

[42] The Leo Report concludes that some of the named apical ancestors and their immediate descendants are directly associated with places within traditional Bigambul country. In Mr Leo's view, others later came to be associated with traditional Bigambul country through their genealogical relationships with following generations—at [748 to [757]. He is therefore satisfied that based on the recruitment principle of 'biological' descent from one of the seven apical ancestors, there is evidence to support the named ancestors' association with (connection to) traditional Bigambul country:

Overall, the expert reports employed weight of evidence arguments based on some or all of the following: (1) what Tindale and Birdsell recorded about their tribal/language identity; (2) the places the apical ancestors and their immediate descendants were associated with; (3) that an apical's descendants had a 'consistent' association with places in the Claim Area; (4) that present descendants identify as Bigambul; and (5) that those apicals and their descendants are accepted and acknowledged as Bigambul by other Bigambul People—at [729].

[43] There is, in my view, a factual basis that goes to showing the history of association that members of the claim group have, and that their predecessors had, with the area covered by the application—see *Gudjala 2007* at [51]. It is supported by the information in the Leo and Kenny 2015 Reports and further substantiated by the information attested to by the claimants in their affidavits. I am satisfied that the information before me supports the existence of a link between the current claim group and its predecessors. The information (as outlined above) supports the claim group's connection to the land and waters of the application area and that this connection has its origins in the preceding generations' association with the area. This is sufficient for me to be satisfied that the Bigambul People native title claim group has, and its predecessors had, an association with the area.

### **Reasons for s 190B(5)(b)**

[44] This subsection requires that I be satisfied that the material before me provides a sufficient factual basis to support the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group which give rise to the native title rights and interests it claims—*Gudjala 2007* at [62] and [63]. In *Gudjala 2007*, Dowsett J considered that the factual basis materials for this assertion must demonstrate<sup>8</sup>:

- that the laws and customs currently observed by the claim group have their source in a pre-sovereignty society and have been observed since that time by a continuing society—at [63];
- the identification of a society of people living according to a system of identifiable laws and customs, having a normative content, which existed at the time of sovereignty—at [65] and see also at [66]; and
- the link between the claim group described in the application and the area covered by the application, 'identifying some link between the apical ancestors and any society existing at sovereignty'—at [66].

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<sup>8</sup> This was not criticised by the Full Court in *Gudjala FC* (at [71], [72] and [96]).

[45] In my view, there is sufficient factual account in the amended application and other material to support the proposition, that under the traditional laws and customs of the claim group, there exist rights and interests that relate to the land and waters of the area covered by the application.

*The relevant society*

[46] The Leo Report sets out conclusions and findings, about the evidence for the ‘existence of a regional Society pre- and post-sovereignty’—at [127]. The information supporting this view is said to be strongest relating to the section system that governed the groups comprising the regional society and the evidence of the Bora ceremonies held on or near the west of the claim area as well as to its east. There is said to be ‘a strong basis for concluding that the regional Pre-Sovereignty Society (and post sovereignty one) encompassed much of the Darling, Balonne and Barwon river systems of northern New South Wales and southern Queensland’—at [129]. The Kenny 2015 Report is assessed by Mr Leo to favour ‘the existence of a regional Pre-Sovereignty Society of shared Laws and Customs, and particularly those ‘relating to land’, kinship, intermarriage and shared ceremonies’. It is his view that the totality of the source material and opinion before him ‘suggests a regional Society that is highly likely to include the Kamilaroi, Kambuwal, Mandandanji (a ‘Kogai group’) and Yuwaaklaraay’—at [122].

[47] The Kenny 2015 Report provides the conclusion that the land tenure system governing the way rights and interests are held and exercised continues in modified form today. Membership of the Bigambul native title claim group is regulated today by descent through either parent, ‘so long as these are based on descent from a Bigambul ancestor’ (a modification of the patrilineal descent mechanisms of pre-European contact)—[601].

[48] The continuation of that regional society, and in particular the Bigambul subset, is said in the Leo Report to have ‘substantially maintained its identify and existence’. That is, there is strong evidence in all the expert reports and in the lay evidence that the ‘regional Kamilaroi Nation and its Bigambul landholding subset’ has substantially continued ‘from generation to generation in accordance with the traditional laws and customs through to the present time—at [379]. As found in the Kenny 2015 Report, ‘[a]ll members have rights and interest in all Bigambul country’, the contemporary group bound by ‘kin ties, descent ideology and mutual recognition and acknowledgement and perceive this belonging together as based on their law and custom’—[601].

*Traditional laws and customs acknowledged and observed*

[49] The Leo Report is also of the view that the Kenny 2015 Report ‘provides sufficient basis for accepting the Continuity of Laws and Customs’. Adaptation may have occurred in relation to the ‘crucial normative system rules pertaining to ‘land tenure’ and to ‘recruitment’ but there exists laws and customs in respect of these aspects that continue to be acknowledged and observed by the native title claim group. Also evidenced are continuing laws and customs relating to authority

structures, classificatory kinship systems, ceremonial life and religious beliefs, albeit also with some adaptation. Certain social practices however, were considered to have 'seriously attenuated' – at [462].

[50] Mr Leo is of the view that the lay evidence (provided by members of the native title claim group) substantiates and corroborates the opinions in the expert reports, particularly the Kenny 2015 Report. Based on the 'totality of the source material', he has formed views in relation to the continuity, acknowledgement and observance of those laws and customs by claimants, including their nature and content – [463]. Briefly, these are:

- Land tenure system – adapted from small landholding groups and now coalesced under Bigambul language identity. Claimants attest to Bigambul identity, being the basis for asserting rights and interests in Bigambul territory. In so doing claimants need to look after country, speak for country.
- System of recruitment – adapted from patrilineal to cognatic descent – referred to as 'bloodline connection to country'.
- Classificatory kinship system – adapted but continues to structure biological and non-biological relationships evidenced in rules of behaviour including showing of respect, sharing of food and participation in certain events.
- Ceremonial life – male initiation has ceased but claimants are aware of its past role; restricted knowledge holders; smoking ceremonies, festivities and burial rites continue; the rise of other community and cultural events, welcomes to country.
- System of totems – adapted to being expressed only in terms of personal or family totems.
- Religious system – continues in relation to the belief in the primacy of ancestral spirits and creation beings and creatures that populate Bigambul country and govern certain behaviour and actions.
- Authority structures – continue in the role of elders in decision-making, the authority of elders to speak for family and for the Bigambul as a group – [464] to [472].

[51] There is clearly a wealth of material in relation to the Bigambul people's claim and the nature of the research and assessment is advanced and appears to be now largely settled. For the purposes of registration, a sufficient factual basis is found in the conclusions and findings of both the Kenny 2015 and Leo Reports, which in turn, is illustrated in the affidavits of the members of the native title claim group. In my view all of this material supports the assertion that under the traditional laws and customs of the Bigambul people, there exist rights and interests that relate to the land and waters of area covered by the application.

### **Reasons for s 190B(5)(c)**

[52] This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs. In order to be satisfied that there is a factual basis for s 190B(5)(c) there must be some material which addresses those matters outlined by Dowsett J in *Gudjala 2007* at [63], [65] and [66] (as summarised above).

[53] The Kenny 2015 Report includes an executive summary at the outset to the report – some of which goes to the issues relevant to the assertion that the native title claim group has continued to hold native title in accordance with its traditional laws and customs:

- despite the impacts of European settlement and adaptations to the system, continuity of laws and customs have been maintained;
- there is evidence of continuity of connection between Bigambul people, their ancestors and their land;
- Bigambul people have maintained a continuous presence on their country since first contact;
- knowledge relating to the ecology, geography, natural resources and significant places of Bigambul country remains strong and a part of Bigambul cultural heritage;
- knowledge and influence of the elementary, primordial spirits that populate the landscape has been maintained by native title claim group to the present day, as well as its respect and acknowledgement of the spirits of their ‘old people’;
- the group’s transmission of knowledge, rights and responsibilities in relation to land is rooted in tradition and continues to the present day – at [11]

[54] These expert findings are demonstrated in the claimant affidavits which provide personal and particular examples and stories of the continuing acknowledgement and observance of traditional laws and customs by the native title claim group.

[55] It is clear from these that continued acknowledgement and observance of Bigambul traditional law and custom has been possible because the members of the claim group and their predecessors have continued to live, work and travel through the area covered by the application despite the impacts of European settlement. They have continued to practise their traditional laws and customs (albeit in modified or adapted form) and adhere to the processes that regulate their association with and responsibilities to their country (including the area of this application).

[56] There is sufficient information before me to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs.

## **Conclusion**

[57] The application satisfies the condition of s 190B(5) because the factual basis provided is sufficient to support each of the particularised assertions in s 190B(5).

## **Subsection 190B(6)**

### **Prima facie case**

The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

[58] Under s 190B(6) I must be satisfied that at least one of the native title rights and interests claimed by the native title group can be established, prima facie. I refer to the comments made by Mansfield J in *Doepel* about the nature of the test at s 190B(6):

- It is a prima facie test and ‘if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis’ – *Doepel* at [135].
- It involves some ‘measure’ and ‘weighing’ of the factual basis and imposes ‘a more onerous test to be applied to the individual rights and interests claimed’ – *Doepel* at [126], [127] and [132].

[59] I have examined the factual basis for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine whether prima facie, they:

- exist under traditional law and custom in relation to any of the land or waters under claim;
- are native title rights and interests in relation to land or waters (see chapeau to s 223(1)); and
- are rights and interests that have not been extinguished over the whole of the application area.

[60] The summaries of previous expert reports provided in the Leo Report show a progressive increase in the provision of information in respect of the rights and interests claimed by the Bigambul people in relation to the land and waters of the claim area. Mr Leo’s assessment of the Kenny 2015 Report is that it ‘provides sufficient evidence and opinion to accept that the Native Title Claim Group has Rights and Interests in Biagambul country and that they are held across the whole of that area without variation’ – at [579]. He maintains the same view in respect of the information contained in the lay evidence – it being in sufficient detail to show ‘how such members of the Native Title Claim Group, the elders and descendants have, since about the 1920s, continued to exercise the full range of non-exclusive Rights and Interests listed in the Amended Application’ ... – [580].

#### *Exclusive right*

[61] The Leo Report provides the view that the totality of the expert and lay evidence provides a reasonable basis on which to accept the claim to exclusive possession... – at [584]. In my view, the information in the affidavits sufficiently illustrates the characteristics of the exclusive right – the acknowledgement and observance of permission and access protocols in the right to speak for country and to exclude others not of Bigambul descent. For example:

Bigambul people belong to our country and we have rights and obligations that other people do not have....People who are not Bigambul should not go onto our country or take things from the land without our permissions. To do so without our knowledge and permission is a sign of disrespect and is an insult to us, our elders, our ancestors and our land. We expect other people to come to us and ask before they onto Bigambul country – affidavit, **[Claimant 3 – name deleted]**, 2 September 2014 at [6].

[62] In my view, the right to exclusive possession is evidenced in the material before me such that I consider that it can be established, prima facie.

### *Non exclusive rights*

[63] The Leo Report sets out numerous examples of claimants' recounting of their ancestry, knowledge of and physical connection to Bigambul country – including their use of its resources, their accessing of the land and waters of the claim area, their hunting and fishing, protection of sites and areas of significance, permission protocols, ceremonies, meetings and looking after country—[570] to [575]. I also refer to the details set out in the Leo and Kenny 2105 Reports supporting the assertion that the native title claim group's traditional laws and customs continue to exist. In my view there is sufficient material before me to evidence that these laws and customs give rise to all of the non-exclusive rights claimed in the application and I am satisfied they can be established, *prima facie*.

### *Conclusion*

[64] The application satisfies the condition of s 190B(6).

## **Subsection 190B(7)**

### **Traditional physical connection**

The Registrar must be satisfied that at least one member of the native title claim group:

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
- (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
  - (i) the Crown in any capacity, or
  - (ii) a statutory authority of the Crown in any capacity, or
  - (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

[65] I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. This condition 'can be seen as requiring some measure of substantive (as distinct from procedural) quality control upon the application' – *Gudjala FC* at [84].

[66] In *Doepel*, Mansfield J also considers the nature of the Registrar's task at s 190B(7):

Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration – at [18].

[67] All 4 claimants' affidavits attest to a strong physical and traditional presence on and connection with the land and waters of the area covered by the amended application. This is a

connection gained through the continuing inter-generational transfer of Bigambul laws and customs.

[68] **[Claimant 2 – name deleted]** was born in the claim area at Toobelah, his parents and grandparents were born also on the claim area, living and working all their lives around the towns and pastoral stations that arose on Bigambul country—at [2] to [13]. He has maintained a continuous connection with his country, learning from his uncles how to live in the bush, how to hunt and fish, to prepare food, to locate the sites of importance to his people, to care for and protect his country. Mr **[Claimant 2 – name deleted]** is an Elder of the Bigambul native title claim group, he knows the stories associated with specific geographical features, the rights and responsibilities that regulate his acknowledgement and observance of Bigambul traditional law and custom.

[69] I am satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area.

[70] The application satisfies the condition of s 190B(7).

## **Subsection 190B(8)**

### **No failure to comply with s 61A**

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

(2) If:

(a) a previous exclusive possession act (see s 23B) was done in relation to an area; and

(b) either:

(i) the act was an act attributable to the Commonwealth; or

(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others

(4) However, subsection (2) or (3) does not apply to an application if:

(a) the only previous exclusive possession act or previous non-exclusive possession act

concerned was one whose extinguishment of native title rights and interests would be

required by section 47, 47A or 47B to be disregarded were the application to be made; and

(b) the application states that section 47, 47A or 47B, as the case may be, applies to it.

[71] In the reasons below, I look at each part of s 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

#### *Section 61A(1)*

[72] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial report dated 24 June 2015 and a search that I have made of the Tribunal's geospatial databases on the day of my decision confirms that there are no approved determinations of native title over the area covered by the application.

#### *Section 61A(2)*

[73] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. Schedule B provides the relevant general exclusion statements that the application excludes any area where a previous exclusive possession act was done in relation to the area covered by the application.

#### *Section 61A(3)*

[74] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, , unless the circumstances described in s 61A(4) apply. Schedule B at paragraph 3 states that exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts.

### **Conclusion**

[75] In my view the application does not offend the provisions of ss 61A(1), 61A(2) and 61A(3) and therefore the application satisfies the condition of s 190B(8).

### **Subsection 190B(9)**

#### **No extinguishment etc. of claimed native title**

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

- (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
- (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

- (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

[76] I consider each of the subconditions of s 190B(9) in my reasons below.

*Section 190B(9)(a)*

[77] Schedule Q contains the statement that 'the native title claim group does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown'.

*Section 190B(9)(b)*

[78] Schedule P contains the statement that the application does not include a claim to exclusive possession of all or part of an offshore place.

*Section 190B(9)(c)*

[79] Schedule B at paragraph 6 states that the application excludes land or waters where the native title rights and interests claimed have been otherwise extinguished.

**Conclusion**

[80] In my view the application does not offend any of the provisions of ss 190B(9)(a), (b) and (c) and therefore the application meets the condition of s 190B(9)

## *Procedural and other conditions: s 190C*

### **Subsection 190C(2)**

#### **Information etc. required by ss 61 and 62**

The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

[81] The application satisfies the condition of s 190C(2), because it contains all of the details and other information and documents required by ss 61 and 62, as set out in the reasons below.

[82] Section 190C(2) 'directs attention to the contents of the application and supporting affidavits' and 'seeks to ensure that the application contains 'all details' required by s 61'. This condition is procedural only and simply requires the Registrar to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. I am not required to undertake any merit or qualitative assessment of the material for the purposes—*Doepel* at [16] and also at [35] to [39]. In other words, does the application contain the prescribed details and other information required of it?

[83] Below I consider each of the particular parts of ss 61 and 62, which require the application to contain details/other information or to be accompanied by an affidavit or other documents.

#### **Native title claim group: s 61(1)**

[84] The details relevant to my consideration are set out in the application at Part A, 1 and 2 and at Schedules A and R.

[85] This section provides that a native title determination application may be made by 'a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group'. The Registrar must consider 'whether the application sets out the native title claim group in the terms required by s 61'—*Doepel* at [36]. Specifically:

If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration—*Doepel* at [36].

[86] In my view, there is nothing on the face of the amended application that suggests that it is not brought on behalf of all members of the native title claim group.

[87] The application contains all the details and other information required by s 61(1).

**Name and address for service: s 61(3)**

[88] Part B of the application states on page 16 the name and address for service of the persons who are the applicant.

[89] The application contains all details and other information required by s 61(3).

**Native title claim group named/described: s 61(4)**

[90] Schedule A provides a description of the persons who comprise the native title claim group.

[91] The application contains all details and other information required by s 61(4).

**Affidavits in prescribed form: s 62(1)(a)**

[92] Four affidavits accompany the amended application, affirmed and signed by each of the persons who comprise the applicant and each witnessed and dated 22 or 29 May 2015. The affidavits address all of the requirements of this condition. However, none of the affidavits include the specific wording prescribed by subsection (iv) that the applicant is authorised by all of the persons in the native title claim group. Instead, the relevant statement reads as follows:

As a result of the outcome of the authorisation meeting, I am authorised to prosecute the native title claim and to deal with matters arising in relation to it, particularly by amending the native title claim in the way required by the order of Justice Reeves dated 1 May 2005—at [6].

[93] Ordinarily the absence of this prescribed wording would, in my view, mean that the affidavits have failed to comply with the requirements of s 62(1)(a). Justice French (as the Honourable Chief Justice then was) inferred in *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) that something may be regarded as being more than a slip or error if it was indicative of the deponent or deponents having failed to direct his or her mind to the matters which must be established—at [10] to [12]. In this instance, I am of the view that the failure to include the phrase ‘all of the persons in the native title claim group’ in the statement required of subsection (iv) is more than likely to be a ‘slip or error’ and is not indicative of the deponents having failed to direct their minds to the matter they must establish. This is supported by other statements in the affidavits that go to the content of the authorisation meeting and the decision-making that took place by the native title claim group. For example:

I was present and voted at the authorisation meeting when the meeting agreed that there was no traditional process of decision-making for decisions of that kind and when I was authorised by the claim group to be an Applicant—at [4].

[94] In my view, each affidavit when read as a whole speaks sufficiently to the matters of authorisation of the applicant by the Bigambul People native title claim group, and on the face of it, satisfactorily reflects the intent of what is required of subsection (iv).

[95] The application is accompanied by the affidavit required by s 62(1)(a).

### **Details required by s 62(1)(b)**

[96] Subsection 62(1)(b) requires that the application contain the details specified in ss 62(2)(a) to (h), as identified in the reasons below.

#### *Information about the boundaries of the area: s 62(2)(a)*

[97] Schedule B provides a list of general exclusion statements for those areas not covered by the application and refers to Attachment B for the description of the external boundaries of the area covered by the application which is a metes and bounds description of those geographical external boundaries, referencing geographic coordinate points.

#### *Map of external boundaries of the area: s 62(2)(b)*

[98] Schedule C refers to Attachment C being a map showing the external boundaries of the area covered by the application.

#### *Searches: s 62(2)(c)*

[99] Schedule D provides the statement that no searches have been carried out.

#### *Description of native title rights and interests: s 62(2)(d)*

[100] Schedule E provides a description of the native title rights and interests claimed in relation to the area covered by the application.

#### *Description of factual basis: s 62(2)(e)*

[101] Schedule F provides a reference list of anthropological reports, evidentiary material and affidavits on which the applicant relies for the factual basis on which it is asserted that the claimed native title rights and interests exist. On a strict reading of s 62(2)(e), this could be considered not to comply with the requirements for a description of a factual basis. All of this material (being Attachments F, G and M) was attached to the proposed amended application annexed to an affidavit of the applicant's legal representative filed in the Court on 24 April 2015. As stated earlier in these reasons, in granting leave to further amend the application in the form attached to the affidavit, the Court ordered that the further amended application, when filed, not include the large attachments at F, G and M.

[102] Both the original application (filed 14 April 2009) and an earlier amended application (filed 8 May 2014) provide a general description of the factual basis in the form of an Attachment F. As a consequence of being considered for registration, in both cases, the general description met the requirements of this condition. The amended application continues to rely on some of the same factual material which supported the original and earlier amended applications.

[103] In my view, a beneficial interpretation is required noting that this is a procedural condition only and the applicant in fact filed all of their factual basis materials when seeking leave to

amend. I note also that the list of the materials at Schedule F at least allows these documents to be identified. It is relevant also, in my view, that the information contained in these documents includes material relied on for the general description of the asserted factual basis provided in the former incarnations of Schedule F. With these factors in mind, I am satisfied that the application does contain a general description of the factual basis.

*Activities: s 62(2)(f)*

[104] Schedule G lists the activities the claim group currently carries out in relation to the area covered by the application.

*Other applications: s 62(2)(g)*

[105] Schedule H states that the area is not covered by another application.

*Section 24MD(6B)(c) notices: s 62(2)(ga)*

[106] Schedule HA states that the applicant is not aware of any such notifications.

*Section 29 notices: s 62(2)(h)*

[107] Schedule I lists (as at 23 October 2008) notices in relation to the area covered by the application advertised between 2012 and 2008.

*Conclusion*

[108] The application contains the details specified in ss 62(2)(a) to (h), and therefore contains all details and other information required by s 62(1)(b).

## **Subsection 190C(3)**

### **No common claimants in previous overlapping applications**

The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

- (a) the previous application covered the whole or part of the area covered by the current application, and
- (b) the previous application was on the Register of Native Title Claims when the current application was made, and
- (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s 190A.

[109] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if a previous application meets the conditions found in ss 190C(3)(a), (b) and (c)—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*) at [9]. Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' that is a registered application when the current application

was made in the Court. The Bigambul application, which is the current application for the purposes of s 190C(3), was made when it was filed in the Court on 19 June 2015.

[110] The geospatial report confirms that no native title determination applications fall within the external boundaries of the current application. As the application is not overlapped by any other applications in the sense discussed in s 190C(3)(a) to (c), there is no requirement that I consider the issue of common claim group membership.

[111] The application satisfies the condition of s 190C(3).

### **Subsection 190C(4) Authorisation/certification**

Under s 190C(4) the Registrar/delegate must be satisfied that either:

- (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Note: The word *authorise* is defined in section 251B.

[112] As the application is not certified pursuant to s 190C(4)(a), it is necessary to consider whether the application meets the condition in s 190C(4)(b): that the applicant is a member of the native title claim group and is authorised by all the other persons in the claim group to make the application and deal with matters arising in relation to it.

#### *The requirements of s 190C(5)*

[113] This condition requires that the Registrar be satisfied that the application:

- (a) includes a statement to the effect that the requirement in s 190C(4)(b) has been met, and
- (b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) has been met.

[114] My consideration is confined to information contained in the amended application, with the requisite statements provided at Schedule R. Specifically:

- (a) The Applicants are members of the native title claim group and are authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
- (b) The Applicants rely on the authorisation meetings of the claim group held on the 17 April 2015 authorising the amendment of the claim. At these meetings the claim group agreed and adopted a process for making decisions.

[115] I am satisfied that they meet the requirements of s 190C(5).

*Is the applicant a member of the native title claim group*

[116] I am satisfied that all the persons comprising the applicant are members of the native title claim group. Each person deposes to this in their affidavits which accompany the application for the purposes of s 62(1)(a).

*Is the applicant authorised*

[117] On 1 May 2015 the Court ordered (amongst other things) that the then applicant be replaced. This replacement of the applicant is the subject of the Court's decision in *Doctor on behalf of the Bigambul People v State of Queensland* (No 3) [2015] FCA 581 (11 June 2015) (*Doctor*). This is the applicant recorded in Part A of the amended application before me.

[118] Given the Court's decision is in respect of the authorisation of the applicant to make and deal with this amended application, it is my view that the findings in *Cadbury UK Ltd v Registrar of Trade Marks* [2008] FCA 1126 are relevant to my task at this condition for registration:

...The evidence to which an administrative tribunal may have regard can include evidence that has been given in another proceeding, including a court proceeding, provided the evidence is relevant to an issue before the tribunal: *In re A Solicitor* [1993] QB 69 at 77. A tribunal may also accept as evidence the reasons for judgment given by a judge in other proceedings. But if the tribunal takes the approach that it should not disagree with findings made by the judge then the tribunal has fallen into error. The general rule is that a tribunal that is required to decide an issue will be in breach of that obligation if it merely adopts the decision of the judge on the same issue...I do not mean to imply that reasons for decision given by a judge are irrelevant to an administrative tribunal. First of all, those reasons may...be received into evidence. They must then be given some weight. Indeed, the judge's findings may be treated as prime facie correct. On the other hand, if the judge's findings are challenged, the tribunal must decide the matter for itself on the evidence before it: *General Medical Council v Spackman* [1943] AC 627—at [18] to [19].

[119] The Bigambul people had two meetings in Toowoomba on 17 April 2015. The first was to consider the composition of the native title claim group and, based on current anthropological research and evidence, a resolution was carried to make certain changes to the description of the group. The second meeting was held by the reconstituted native title claim group and resolutions were carried to authorize an applicant to make and deal with this amended application. The material relevant to this entire process is attached to the amended application and was the subject of Reeves J's consideration and findings in *Doctor*.

[120] His Honour found that the Bigambul native title claim group authorised the applicant of the reconstituted Bigambul claim group to make this amended application. On this basis I have decided it is appropriate to have regard to the findings by Reeves J in *Doctor* because they are specific to my consideration of whether the applicant is authorised.

[121] Particularly pertinent are the comments made by Reeves J in relation to the evidence which supports his decision. In order to come to the above finding, His Honour was satisfied about the following matters:

- ‘...that fair notice was given of the business that was to be dealt with at the Toowoomba meetings] ... From reading the notice, it follows that a member of the Bigambul claim group would have been able to make an informed decision about whether or not he or she wished to attend the meeting and participate in the decision-making process about those items of business’ – at [51];
- ‘that the notice was widely circulated... it was published in a newspaper and in a periodical, both of which have a wide circulation in the region where members of the Bigambul claim group were likely to reside...[and] individually posted to approximately 300 people who were known to be members of the Bigambul claim group...’ – at [52];
- ‘The whole of the Bigambul claim group was therefore given a reasonable opportunity to attend and participate in the decision-making process that was to occur at the meetings.’ – at [53];
- ‘that 242 people attended the meetings supports this conclusion’ – at [54];
- ‘the information provided ... was sufficiently comprehensive and detailed that those present at the meetings were likely to have been fully and properly informed about each of the items of business before they were called upon to vote on the various resolutions at the meetings.’ – at [55].

[122] His Honour was ‘satisfied that the whole of the Bigambul claim group met at the Toowoomba meetings and made a properly informed decision to make the proposed changes to the description of the Bigambul claim group’ – at [56]. After some consideration of the wording of the notice in respect of the proceedings for the second meeting, Reeves J was also satisfied as to the authorisation of the applicant (which occurred at the 2<sup>nd</sup> meeting):

I consider that fair notice was given to the members of the Bigambul claim group that one of the items of business to be considered at the Toowoomba meetings was the authorisation of a new Bigambul Applicant to pursue the amended Bigambul application on behalf of whatever reconstituted Bigambul claim group emerged from the earlier decisions to be made at those meetings. I am therefore satisfied that the reconstituted Bigambul claim group has properly authorised the new Bigambul Applicant to pursue the amended Bigambul application on their behalf – at [73].

[123] While I do not ‘merely adopt’ the reasons for judgment in *Doctor*, they are relevant to my consideration because they consider the same the same material and requirements in relation to authorisation of an applicant to make and deal with a native title determination application. I would have proceeded in the same fashion to consider the same material and come to the same conclusions.

[124] I am therefore satisfied that the each of the persons comprising the applicant is a member of the native title claim group and that each is authorised to make and deal with the Bigambul People application.

[End of reasons]

# Attachment A

## Information to be included on the Register of Native Title Claims

<b>Application name</b>	Bigambul People
<b>NNTT file no.</b>	QC2009/002
<b>Federal Court of Australia file no.</b>	QUD101/2009

In accordance with ss 190(1) and 186 of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

### *Section 186(1): Mandatory information*

**Application filed/lodged with:**

Federal Court

**Date application filed/lodged:**

As per Schedule

**Date application entered on Register:**

As per Schedule

**Applicant:**

As per Schedule

**Applicant's address for service:**

As per Schedule

**Area covered by application:**

As per Schedule

**Persons claiming to hold native title:**

As per Schedule

**Registered native title rights and interests:**

As per Schedule